



IDAHO
LEGAL
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SOCIETY

EST. 2005

LAWYERS ACTIVE IN EARLY
DEMOCRATIC POLITICS

Many Idaho Democrats in the 1860s were “Secessionists” who were either from the southern U.S. or were supporters of the southern cause. Most came to Idaho from border states like Ohio and Missouri to escape the Civil War. The most outspoken of the Democrats were often the lawyers and judges who were known for their oratorical abilities.

In 1863, Idaho Democrats held a rally in Boise in front of the Overland Hotel, complete with a band playing music and a bell-ringing crier to announce the event. Lawyers Frank Ganahl and Albert Heed were the featured speakers at the rally. Heed spoke of his opposition to the trial and execution of Mrs. Mary Surratt who allegedly conspired to murder President Abraham Lincoln. Ganahl spoke on a similar topic but did not get the usual positive audience response to his oratory. He then proceeded to scold the audience for their response

(or lack thereof) and they drifted away. Only about 36 people attended the rally and the local Republican newspaper called the event “a fizzle.” Additionally, the *Idaho Statesman* found Ganahl to be “. . . a man of unbounded assertion. No pent up facts or contracted record controls his speech.”

Although the rally in Boise City was lukewarm, Boise County was another story. There a majority of voters vocally supported both the southern cause and the Democratic Party. Idaho City lawyer Edward D. (Ned) Holbrook won election as Idaho Territory’s delegate to Congress in 1864, largely because of the majority of southern voters in Boise County.

Two years later at the Democrat’s June

1866 convention in Boise City, lawyers played an important role in the proceedings as rival party nominees. It would rank among the legendary intra-party conflicts of that era in Idaho. The Democrats met in Boise City at Riggs’



Edward D. Holbrook

and Agnew’s Saloon at Seventh and Main Streets in what the *Idaho Statesman* described as, “. . . about as

inharmonious [an] assembly as was ever witnessed.” The saloon proprietor James Agnew, himself a Democrat, hailed from Virginia and later served as Ada County Sheriff.

D.W. Douthitt and Holbrook, both lawyers from Idaho City, were rivals for their party’s nomination for Delegate to Congress. Holbrook was the incumbent but Douthitt was no stranger to politics, having been an active Democrat in Oregon Territory in the late 1850s and early 1860s.

Ganahl and another lawyer, Theodore Burmester, had both strongly opposed Holbrook in the past. Now they nominated him and denounced Douthitt in a series of dramatic orations. Debates in the party centered on the issue of “negro suffrage,” since most party members were southern sympathizers. After hours of verbal attack, Douthitt withdrew his name from nomination and Holbrook’s faction prevailed.

The argument continued after the Convention when Douthitt



1864 Democratic Party campaign poster.

Byron J. Johnson
2011 Awards

The Idaho Legal History Society congratulates this year’s winners of the Justice Byron J. Johnson Distinguished Service Awards: Eric White, Debora Kristensen, and Claudia Druss.

Eric White worked tirelessly to review and prepare indices of transcripts for the Oral History Subcommittee at the Idaho History Center in Boise. ILHS is grateful for all the Saturdays he volunteered in assisting the Subcommittee.



Debora Kristensen is one of the most devoted members of ILHS. She is appreciated and recognized for the thousands of hours spent furthering the ILHS mission. There is no one more deserving or more qualified for this award. Her devotion, dedication and unending support are exemplary of her selflessness. She has



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worked tirelessly on fundraising for the *Tents to Towers* book project, as well as editing and providing feedback on the book. In addition, she has spent hundreds of hours providing updates to the website.

Claudia Druss is recognized for researching and reviewing historical documents to ensure that the ILHS quarterly newsletters are relevant, interesting, and factually correct. She is also commended for her hard work and diligence in drafting the *Tents to Towers* book. Thanks to her extraordinary efforts, the ILHS will publish its first coffee table book describing the significant role of lawyers, judges, and courts in the history of Idaho.



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This newsletter published quarterly by:

Idaho Legal History Society

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A Message from the President Scott W. Reed

The six-hour Ken Burns documentary “Prohibition: Nation of Drunkards” on public television in early October depicted the nearly unbelievable adoption of the 18th Amendment and then the following 15 years of equally startling blatant law violations by otherwise law abiding citizens. The documentary was based on *Last Call, the Rise and Fall of Prohibition* (2010). I was moved to take a quick look at Idaho’s participation in this drama.

Idaho was caught with prohibition fever. First came the 1909 Local Option Act that allowed every county to accept a petition to submit for popular vote whether the sale of intoxicating beverages should be prohibited. If passed, the county became a “Prohibition District.”

In 1910, the Idaho Supreme Court in *Mix v. Nez Perce County* (18 Idaho 695) rejected a constitutional challenge with this broad, damning conclusion:

It is almost universally recognized that indulgence in intoxicating liquors leads to immorality, crime and pauperism, and that such liquors are in their nature dangerous to the morals, good order, health and safety of the people . . .

(18 Idaho at 707)

The cases reflected a dichotomy with rural folks supporting prohibition and city folks not so much so. All over the state, petitions for prohibition were presented to boards of commissioners and many were adopted creating “dry” and “wet” counties. In 1915, the Legislature enacted a statute declaring all of Idaho to be a “Prohibition District,” prohibiting manufacture, disposal, and transport of intoxicating liquor (*State v. McBride*, 33 Idaho 124, 1920). This was four years before the federal Volstead Act.

The 1915 statute allowed druggists and physicians to “. . . import and sell pure alcohol for mechanical and scientific purposes. . .” (*Chas. L. Joy & Co., Ltd. v. Carlson*, 28 Idaho 455, 1916; *State v. Morton*, 31 Idaho 329, 1918). A similar loophole in the Volstead Act allowed sale through druggists of nearly all of the 29 million gallons of liquor in bonded warehouses at the beginning of Prohibition. One Boston druggist resold 50,000 pints of fine bourbon on the local medicinal market.

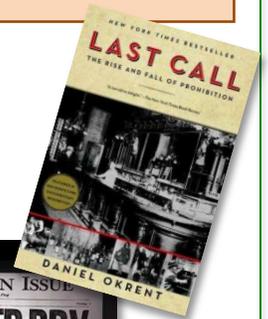
In 1916, with the requisite two-thirds legislative submission and a popular vote of approval, Section 26 of Article III of the Idaho Constitution was adopted to prohibit sale and transportation of intoxicating liquor for beverage purposes throughout the state. In 1922, the Supreme Court rejected the argument that the federal Volstead Act and the 18th Amendment had pre-empted similar state laws (*State v. Moore*, 36 Idaho 865). Throughout this prohibition period from 1909 until Section 26 was repealed in 1934, the opinions often contained a declaration that the manufacture, sale, and consumption of intoxicating liquor was a public nuisance constituting a menace to the peace, health, safety, personal rights, and morals of the citizens.

Did all the judges and attorneys obey the prohibition laws they so eloquently supported? I think not. One summer evening in the late 1920s according to family legend, John P. Gray, Coeur d’Alene’s most famous attorney, telephoned his law partner W. F. McNaughton, later to become a Supreme Court Justice:

Bill, we have a small fire and I’ve called the city fire department. Hurry over and help me carry all the moonshine out of our basement before they get here.

In my first civil case back in 1957, the opposing attorney was Harold Purdy. His was the classic case of a rising star: University of Idaho football star, World War I Ace, and an outstanding law practice felled by alcohol. Harold told me that in the early 1930s he had been charged with selling liquor. He successfully defended himself, telling the jury that he never sold but instead drank every bottle of booze he had ever obtained.

Source: *Last Call, The Rise and Fall of Prohibition*, D. Okrent, 2010, pp.199–200.



20th Century Profile

Judge Thomas G. Nelson

Thomas G. Nelson was born in 1936 in Idaho Falls. He earned his law degree from the University of Idaho in 1962. Nelson served in the Judge Advocate General Corps of the U.S. Army Reserve before going to work in the Idaho Attorney General's office in 1963 for Allan Shepard, initially working on occupational licensing and criminal appeals.

Nelson was eventually appointed Chief Criminal Deputy in charge of the Departments of Law Enforcement and Corrections. Because of the workload, he sometimes argued two or three cases a day before the Supreme Court. Nelson recalled that he had ". . . tried a time or two to tell the Supreme Court a joke, and I've never gotten anywhere with it."

In 1965, Nelson moved to Twin Falls to practice with Parry, Robertson & Daly, a firm known for its water rights work. There he did water rights, public utilities, and insurance defense work and was also City Attorney for Sun Valley.

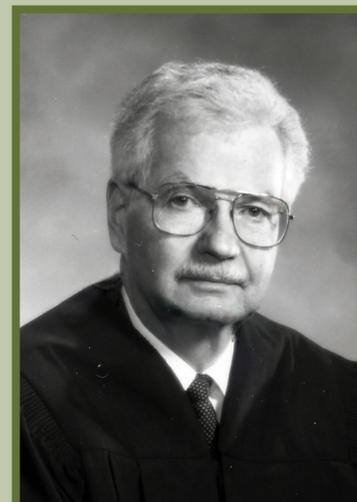
As a young lawyer, Nelson often worked long hours but learned a valuable lesson from John Daly a partner in the firm. Daly noted that working extra long hours to the point of exhaustion often only meant that a lawyer would have to redo the work. Nelson observed in 1995 that:

When I see these kids in law firms that are consistently working 80-90 hours a week, they can put in that much time, but in terms of really doing any intellectual work, you can't do it.

Nelson served on the Idaho Bar's Board of Commissioners (1972-1975) when the Commissioners were responsible for grading bar exams. There were times when all applicants failed the exam. In 1972, 48 of the 86 applicants failed, leading to a major controversy. The Supreme Court was flooded with petitions from would-be lawyers and appointed three Special Masters to review the petitions. The Court ultimately admitted a number of the petitioners. In retrospect, Nelson felt that the problem was not due to poor grading, but may have been the result of relaxed educational standards during

that era.

In 1990, President George H.W. Bush appointed Nelson to the Ninth Circuit Court of Appeals. He became a Senior Judge in 2003. Judge Nelson's approach to hearing cases included using oral arguments as a time to get his questions about the case answered and "not to belittle or



humiliate the lawyers, or to show off." He noted that the District Judges were usually right in their decisions—more than 90% of the time. In later years, Judge Nelson recalled long-ago advice he had received from District Judge Theron Ward in Twin Falls:

. . . usually a trial judge knows more about a case that he has to decide . . . right after the case is over than he is going to know later. So [the] theory was, rule immediately and then let the lawyers play with it from there, which I think is a good rule.

Judge Nelson felt that most courts did not influence public policy and found federal judges often to be politically naïve. He noted that when a political activist is appointed to the court, "you've taken Ferdinand and made him a steer in terms of political influence." He felt that Congress listened to federal judges only if the judges were saying something Congress already wanted to hear.

In 1994, Nelson received the University of Idaho College of Law's Award of Legal Merit for his outstanding contributions to the legal profession. He died in 2011 at Boise.

Sources: Interview with Thomas G. Nelson by Glenda Longstreet, Ninth Judicial Circuit Historical Society, 1996; Idaho State Journal, May 6, 2011.

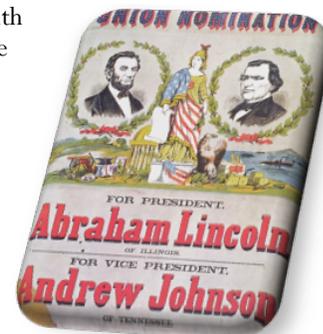


Sidney Edgerton

FIRST JUSTICES & DISTRICT JUDGES REPUBLICAN

Idaho's "Union" Republicans generally hailed from the northern states and were staunch supporters of President Lincoln. The first three Idaho Justices appointed by Lincoln were Republicans or relatives of Republicans. Sidney Edgerton, a successful lawyer and Republican Abolitionist from New York was the first Chief Justice appointed. Justice Samuel C. Parks was a longtime friend of Lincoln who had known him since he was a child and frequently associated with him in his Illinois law practice. Parks worked for Lincoln's nomination for Vice President in 1856 and for President in 1860. Justice Alleck Smith was a Republican from Illinois who was appointed through the intercession of his father-in-law who was a friend of Lincoln.

The appointment of Republican Justices and District Judges, who generally lived in the eastern U.S. when they were appointed, led to ongoing friction with Idaho's mostly Democrat and southern local judges and lawyers. Because of this political divide, District Court decisions in both criminal and civil cases could evolve into major political disputes. Whether the case involved murder, mining claims, or taxes, the losing party could be counted on to claim that the loss was the result of partisan bias. Local political newspapers vociferously took sides in many court cases and whipped up public sentiment to a fever pitch, especially during election years.



1864 Republican Party campaign poster.

POLITICALLY ACTIVE DEMOCRAT LAWYERS

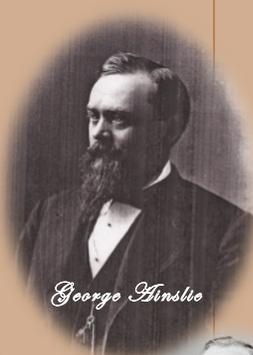
George Ainslie was a southern Democrat from Missouri who played a controlling role in Idaho Democratic politics of the 1860s. After admission to the Missouri Bar, Ainslie followed mining opportunities to Idaho in 1862. He was admitted to practice law at Idaho City in 1864 and to practice before the Idaho Supreme Court in 1866. Ainslie practiced with R.E. Foote in Idaho City where he also had mining claims and edited the *Idaho World* Democratic newspaper (1869-1873).

Ainslie served on the Idaho Territorial Council and as District Attorney in the Second Judicial District. In 1878, he was elected to represent Idaho in Congress, where he served until 1882.

Ainslie was Chairman of the Idaho Democratic Party and a spokesperson for the Party at the Idaho Constitutional Convention in 1889. After moving to Boise City in 1890, Ainslie served as President of the Ada County Bar Association.

Sources: *Idaho's Constitution*, D.C. Colson, 1991;

"George Ainslie," *Idaho State Historical Society Reference Series* 566, 1981.



George Ainslie



Samuel Merritt

Politician and lawyer Samuel Merritt was a Democrat from Virginia. He was admitted to the California Bar in 1852 and served in the California State Senate before moving to Idaho in 1862. Merritt was admitted to practice law in Idaho in 1866.

He immediately became active in Idaho Democratic politics and served as Territorial Delegate to Congress (1871-1873). In 1871, after Idaho had been without a governor for a year, he wrote to President Ulysses S. Grant requesting that a governor be appointed, and noting that, "The office is not a lucrative one, the salary being only \$2500 per annum, barely sufficient, in view of the high price of being in the Territory, to give decent support."

After losing the nomination for another term as Delegate to Congress, Merritt moved to Utah to practice law and pursue his mining interests. As he had in California and Idaho, Merritt continued to be involved in Democratic Party politics in Utah. He was appointed to the Utah Territorial Supreme Court in 1894 and served until Utah became a state in 1896.

Source: "The First 50 Men in Idaho Law," D.K. Kristensen, *The Advocate* 53(10), 2010; *The Papers of Ulysses S. Grant* Vol. 21, J.Y. Simon, ed., 1998.

Alexander Mayhew, the leader of the Democrats at Idaho's Constitutional Convention in 1889, was one of the few Idaho Democrats from the northern U.S.. Mayhew was born in Pennsylvania and graduated from the University of Pennsylvania in 1852. He read law in Pennsylvania and Kansas before admission to the Kansas Bar in 1856. Mayhew spent five years practicing mining law in Colorado Territory before moving to Montana in 1864. He was a county attorney in Montana and served in the Montana Legislature for nine sessions. Mayhew moved to the Coeur d'Alene, Idaho, area in 1884 to practice mining law. He achieved success as a mining claims speculator and served a term in the Idaho Legislature (1887-1889). Mayhew ran for the Idaho Legislature again in 1888, but was defeated by another lawyer, Republican Willis Sweet.

Mayhew represented Shoshone County at the Constitutional Convention. There he chaired the Public and Private Corporations Committee and served on the Judiciary and Election and Right of Suffrage Committees. Mayhew was a vociferous opponent of large corporations and led the effort to regulate railroads.

After statehood, he was elected to the Idaho Senate and served as President Pro Tem (1893-1894). In 1894, Mayhew was elected Judge in the First Judicial District and served two terms.

Source: *Idaho's Constitution*, D.C. Colson, 1991.

Early Idaho Lawyers Active in Democratic Politics

continued from page 1

and Henry C. Street, publisher of the Democratic *Idaho World* newspaper, came to blows over party politics and exchanged gunshots with their derringers. Luckily no one died.

William J. McConnell, a Republican who later became Governor of Idaho, accounted Douthitt to be a southern gentleman who could not be blamed for how he was raised. Whereas, McConnell found Holbrook's supporters to be from "an entirely different class of men." A 19th century historian assessed the Party from a Republican perspective:

...the platform called democratic was nothing more than a menace to union men, and an expression of hatred toward the general government which could not be misunderstood.

Holbrook went on to win a second term in Congress with

heavy support from Boise County voters. As McConnell put it, "...a nomination on the Democratic ticket being equivalent to election in those days."

In his second term, Holbrook was censured by Congress for verbally attacking another member of the House. He eventually died in another violent Democratic Party dispute in Boise County in 1870.

Douthitt left Idaho for San Francisco where he practiced law for many years, regularly arguing cases before the California Supreme Court. He was active in defending Chinese clients against housing discrimination in the 1870s.

Sources: *Early History of Idaho*, W.J. McConnell, 1913; *History Of Washington, Idaho, and Montana*, H.H. Bancroft, 1890; *The Saloon on the Rocky Mountain Mining Frontier*, Elliott West, 1996; *Idaho Tri-Weekly Statesman*, 1866 & 1908.

Tensions between Republicans and Democrats in Idaho Territory often played out in a partisan public response to judicial decisions that were otherwise unrelated to politics. In the Poorman Mine case, Republican Supreme Court Justice and District Judge Milton Kelly's decision resulted in partisan wrangling that led all the way to Washington D.C.. At the time, all of Idaho's Supreme Court Justices, including Kelly, were also District Judges.

The case involved a silver lode claim discovered by Charlie Peck in the Owyhee Mining District in 1865. Peck soon learned that the location had been claimed previously as part of the nearby Hays and Ray Lode, which he then tried unsuccessfully to buy.

Later, a third group of miners found Peck's discovery and began to work there, too. This new group ignored the Hays and Ray Lode and called the claim the Poorman Lode, leading to an immediate lawsuit by Hays and Ray.

It was not long before more parties entered the fray. Hays and Ray sold an interest in their mine to G.C. Robbins who requested an injunction in District Court to prevent further work on the claim until the ownership dispute was settled.

In an effort to sort out the ownership issues, District Judge Kelly paid a visit to the mine to collect evidence. Based on what he observed there, Kelly ruled in favor of the plaintiffs and issued an injunction that was scheduled to last until the next term of District Court in Owyhee County. Unfortunately, a rumor spread that Robbins had paid Kelly a bribe of \$7,000 for the ruling. Kelly was unable to dispel the rumor even after he received written support from the Poorman Mine's Chief Counsel. Kelly became known as "bribery Kelly" by his enemies.

When rumors began circulating that Poorman supporters were out to murder Judge Kelly to prevent him from issuing a permanent injunction, Deputy U.S. Marshal William J. McConnell immediately rushed Judge Kelly back to Boise under guard.

The Poorman case quickly floresced into a political dispute between Republican supporters of Kelly and the Democrats who were his political enemies. In retaliation for the Poorman decision and other unrelated partisan issues, Kelly's enemies were able to manipulate the district judgeships so that Judge Kelly was removed from the case and exiled to the thinly populated First Judicial District at Lewiston. Judge Alleck C. Smith would replace him in Owyhee County.

Robbins responded by requesting that President Andrew

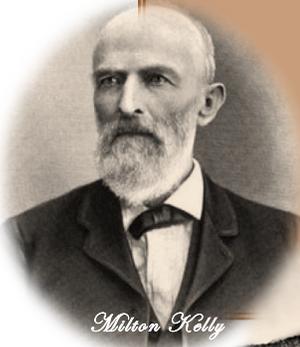
Johnson remove Smith from the Idaho Supreme Court for his drinking problems and lack of judicial experience. Robbins and others nominated Republican John Cummins to replace Smith as a District Judge and Supreme Court Justice.

Cummins' confirmation was held up for six months by partisan bickering. His appointment to the Idaho Supreme Court was finalized in May of 1866.

Meanwhile, in what had almost become an afterthought, Robbins settled the mining case out of court by buying the Poorman claim for \$1 million, an impressive sum in the 19th century.

Kelly's career was further compromised when Democrat lawyer Edward D. Holbrook filed charges with the U.S. Attorney General that accused Kelly of bribery and consorting with vigilantes, among other charges. Kelly was finally exonerated a year later. He left the Bench in 1870 and spent many years as the editor and publisher of the *Idaho Statesman*.

POORMAN MINE DECISION LED TO MAJOR PARTISAN DISPUTE



Milton Kelly



Poorman Mine Mill in the 1890s after the mine was developed.



Alleck C. Smith



Source: "Fighter on the Bench: Milton Kelly's Idaho Legal Career," R.H. Limbaugh, *Idaho Yesterdays* 25(1), 1981.

POLITICALLY ACTIVE REPUBLICAN LAWYERS

Joseph Huston was the longest serving U.S. Attorney during Idaho's Territorial period. He read law in Michigan where he was admitted to the Bar in 1857. Huston worked for the U.S. Treasury Department before serving as a Major in the Civil War. President Ulysses S. Grant appointed him the second U.S. Attorney for the Territory of Idaho, a position he held from 1869 to 1878.

Huston was active in Republican politics in Idaho and was nominated to run for Congress in 1872, but lost in the heavily Democratic Territory. He again fell prey to politics when he lost his position as U.S. Attorney—his nomination was rejected by Democrats in the U.S. Senate.

Huston returned to the private practice of law for the next 12 years and was Mayor of Boise City. He was elected to the Idaho Supreme Court in 1890, serving on the Bench for 10 years before retiring in 1901. According to a historian of the time:

He laid great emphasis upon the fact, frequently overlooked by jurists, that the object of criminal courts was to punish criminals, not furnish them a means of escaping punishment.

Sources: "Personalities Behind the Bench," R. Stapilus, *The Advocate* 34(2), 1991; *Illustrated History of the State of Idaho*, Lewis Publishing Co., 1899.

Weldon Heyburn graduated from the University of Pennsylvania, where he studied law and was admitted to the Pennsylvania Bar in 1876. He moved to Idaho in 1883, practicing law at Wallace while working his mining claims. Heyburn was a member of the 1889 Idaho Constitutional Convention. He chaired the Judiciary Committee and served on the Legislative Apportionment and Labor Committees. Heyburn and lawyer William W. Woods sponsored Helen N. Young in her application to become the first woman to practice law in Idaho in 1895.

Heyburn was elected to the U.S. Senate as a Republican in 1903 and 1908, serving until his death in 1912. In the U.S. Senate, Heyburn gained notoriety by fighting President Theodore Roosevelt's Forest Service program. Heyburn State Park, the first state park in the Pacific Northwest, was created in 1908 from Coeur d'Alene Indian lands.

Sources: *Idaho Vol. III, B. Defenbach*, 1933; "The First 50 Women in Idaho Law," D.K. Kristensen, 2005; *United States Forest Policy*, J. Ise, 1920.

The President of Idaho's Constitutional Convention *William H. Clagett*, has been called the architect of the Idaho

Constitution. Clagett was admitted to the Iowa Bar in 1858. He moved West in 1862 following the news of silver discoveries in Nevada. There he practiced law, mined, and served in the Nevada Legislature (1862-1865). In Nevada, Clagett was the traveling companion of Samuel Clemens (Mark Twain) in Clemens' memoir *Roughing It*.

Clagett left Nevada to practice law in Montana. He represented Montana in Congress (1871-1873), introducing

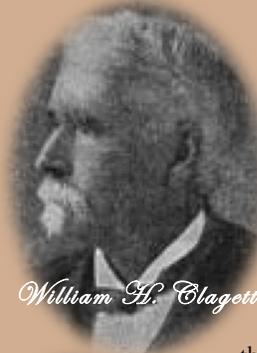
the bill that eventually led to the creation of Yellowstone National Park. After mining and practicing law throughout the West, always following the next big ore discovery, Clagett settled at Coeur d'Alene, Idaho, where he was selected a delegate to the Idaho Constitutional Convention.

Clagett was known as a great orator with a clear, ringing voice and graceful gestures. W.W. Dixon, a friend who wrote a sketch of Clagett's life in 1903 said that:

Men went miles to hear him, and never came away disappointed. Old miners all over the West will tell you they heard 'Billy Clagett' make a speech at such a time and place, and what a wonderful talker he was.

In 1891, Clagett ran for the U.S. Senate on the Republican ticket in a controversial election that resulted in Idaho briefly having three U.S. Senators. Although he lost in 1891, he ran again for the Senate in 1895 on the Populist ticket against Fred T. Dubois and lost again. After the second loss, he moved to the eastern U.S. for a few years before settling in Spokane, Washington, where he spent the last years of his life practicing law.

Sources: *Idaho's Constitution*, D.C. Colson, 1991; *Contributions to the Historical Society of Montana Volume IV*, 1903; "Constitutional Convention," B.J. Johnson, in *Justice for the Times*, ed. C. F. Bianchi, 1990.



William H. Clagett



Weldon Heyburn

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